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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 45

RONALD R. CICHOS,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

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CITATIONS AND AUTHORITY

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions are involved in addition to those set forth in the Brief for Petitioner.

Constitution of Indiana, Art. 1, § 14:

> "No person shall be put in jeopardy twice for the same offense. No person, in any criminal prosecution, shall be compelled to testify against himself."

Burns IND. STAT. ANN., § 9-1902:

> "The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict can not be used or referred to, either, in the evidence or in the argument."

QUESTIONS PRESENTED

Petitioner's statement of the question presented does not adequately inform this Court of the issues before it in this case and fails to comply with Rule 23(1)(c). Respondent, therefore, restates the questions presented as follows:

1. Whether the double jeopardy provision of the Fifth Amendment providing "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb" is essential to a scheme of ordered liberty and so rooted in the traditions and conscience of the people or to be ranked as fundamental, and thereby incorporated in the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and therefore directly applicable to state court proceedings.

2. Whether, assuming arguendo the incorporation of the double jeopardy provision of the Fifth Amendment in the Fourteenth Amendment and its direct applicability to the states, petitioner was "twice put in jeopardy" where he was charged with involuntary manslaughter and reckless homicide, offenses requiring identical proof, and a jury found him guilty of reckless homicide but was silent on the involuntary manslaughter and he secured a new trial on appeal which resulted in an identical jury verdict.

   a. Whether one asserting that he was "twice put in jeopardy where he was charged with involuntary manslaughter and reckless homicide and a jury found

him guilty of reckless homicide but was silent on the involuntary manslaughter and he secured a new trial on appeal which resulted in an identical verdict, was prejudiced by being put to trial on both offenses at the second trial.

b. Whether one who files a motion for a new trial and appeals from the denial thereof after he has been tried by jury in a state court for involuntary manslaughter and reckless homicide and a verdict of guilty for reckless homicide, relinquishes any possible defense of double jeopardy that may be applied to the second trial, if granted by the state appellate court.

STATEMENT OF CASE

Cichos, the petitioner, was charged on a two count amended affidavit, filed November 6, 1958, in the Circuit Court for Parke County, Indiana, with reckless homicide and involuntary manslaughter arising out of an automobile accident that resulted in the death of two people. (R. 1.)

Trial was held by jury resulting in a verdict finding Cichos guilty of the offense of reckless homicide as charged in count one of the affidavit. Thereafter he was sentenced to one to five years in prison and fined the sum of $500 plus costs. Cichos filed a motion for new trial which was overruled. He then appealed from the trial court's ruling on the motion for new trial.

His only assignment of error on appeal to the Supreme Court of Indiana was the overruling of the motion for new trial.

The Supreme Court of Indiana on July 2, 1962, granted Cichos a new trial. (R. 5-6.)

Cichos was thereafter brought to trial for involuntary manslaughter and reckless homicide. The State's demurrer to Cichos' plea of former jeopardy was sustained by the trial court (R. 19). The jury found Cichos guilty of reckless homicide on June 28, 1963 (R. 29). He was thereafter sentenced to one to five years in prison and a fine of $100. The Supreme Court of Indiana affirmed that conviction.

SUMMARY OF ARGUMENT

Petitioner would have this Court overrule *Palko v. Connecticut,* 302 U.S. 319 (1937), and make the double jeopardy provision of the Fifth Amendment directly applicable to the States by reason of incorporation in the Due Process Clause of the Fourteenth Amendment, without presenting a case involving a violation or infringement of the double jeopardy provision.

Even assuming *arguendo* the direct applicability of the Fifth's double jeopardy provision, petitioner was not "twice placed in jeopardy," except upon his own waiver by seeking a complete new trial. Petitioner's position on waiver, however, would necessitate this Court holding that there is a constitutional right to appeal and thereby overrule well established precedent of this Court.

Petitioner has even failed to show that he was prejudiced by the alleged double jeopardy.

Petitioner would have deeply entrenched rules of constitutional law changed so that he can go free after being twice convicted by a jury for the same offense. Petitioner would have this Court suspend justice in his particular case, but which would have profound effect upon American jurisprudence.

Petitioner's contentions are without merit and should be rejected by this Court.

ARGUMENT

I.

THE DOUBLE JEOPARDY PROVISION OF THE FIFTH AMENDMENT IS NEITHER ESSENTIAL TO A SCHEME OF ORDERED LIBERTY OR SO ROOTED IN THE TRADITIONS AND CONSCIENCE OF THE PEOPLE AS TO BE RANKED AS FUNDAMENTAL. IT SHOULD NOT BE HELD DIRECTLY APPLICABLE TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioner, in the case at bar, asks this Court to hold that the double jeopardy provision of the Fifth Amendment is incorporated in the Due Process Clause of the Fourteenth Amendment. Petitioner is asking this Court to overrule *Palko v. Connecticut,* 302 U.S. 319 (1937). Petitioner's contention, however, involves more than *Palko,* but also, in essence questions the validity of *Bartkus v. Illinois,* 359 U.S. 121 (1959) and *Abbate v. United States,* 359 U.S. 187 (1959).

If *Palko v. Connecticut, supra,* is wrong in its holding, then it must be based upon conclusions contrary to law and unsound reasoning. Petitioner's contention, therefore necessitates a thorough re-examination of the reasoning and conclusions of law propounded in *Palko.*

The Court in that case, speaking through Mr. Justice Cardozo, specifically held, upon the facts before it, that a Connecticut statute permitting appeals to be taken by the state did not infringe the Due Process Clause of the Fourteenth Amendment. The Court also held that the double jeopardy provision of the Fifth Amendment was not absorbed in the Due Process Clause of the Fourteenth.

The Court's reasoning was basically two-fold—(1) the application of the double jeopardy principle is essentially one involving policy and (2) as set forth in the Fifth Amendment it is not implicit in the concept of ordered liberty.

The Court reasoned, concerning the policy question, that double jeopardy principles were susceptible of many diverging, and not incorrect applications when it said:

> " . . . Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the States? The tyranny of labels [cite omitted] must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other." 302 U.S. 323

The divergence of opinion springs from the historical limitations on the granting of new trials in criminal cases. See opinion by Mr. Justice Story in *United States v. Gibert*, 25 Fed. Cas. 1287, 1294-1303 (1834). The importance of the early common law pleas of *autrefois acquit* and *autrefois convict* is not the cause of dispute. It is their application to modern-day modes of procedure that incites serious disagreement.

Practice at the time of the writing of the Constitution did not include a new trial for errors in criminal cases. Therefore, the effect of double jeopardy on a new trial was

not clearly envisioned by the framers of the Fifth Amendment. The extent of application, then, of double jeopardy to situations where a new trial was granted under modern procedure required a policy decision by the appellate courts.

Matters of policy, where not imbibed with clear-cut mandates, should be left to the discretion of the individual sovereigns. What may be the right policy for the federal legal system may not be right for the individual states' legal systems. Where reasonable minds differ in the legal philosophy underpinning double jeopardy, this Court should be reluctant to impose its policy decisions on the individual states in the absence of such a mandate—particularly where it retains an overseer position via the Fourteenth's Due Process Clause. This Court has applied some principles of double jeopardy to the states through the Due Process Clause. The issue here, however, goes much further, for petitioner is asking this Court to apply the double jeopardy principles of the Fifth Amendment to the states. The distinctions in application are clearly evidenced by *Palko v. Connecticut, supra,* and *Kepner v. United States,* 195 U.S. 100 (1904).

Mr. Justice Cardozo's reasoning that such an area reflecting divergent, but valid, policy views, in the absence of clear-cut constitutional mandate, should be left to individual state decision was valid in 1937 and is still valid today.

That brings us to the second rationale for the decision, i.e. the double jeopardy provision in the Fifth Amendment is not implicit in the concept of ordered liberty.

This Court clarified the phrase "implicit in the concept of ordered liberty" to mean those principles that could be

eliminated without causing justice to perish, or that their elimination would not sacrifice liberty or justice.

> " . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." 302 U. S. 325

Mr. Justice Cardozo went one step further when he pointed out the method for dividing those amendments in the Bill of Rights inherent in the Due Process Clause and those that were not when he said:

> " . . . Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . " 302 U.S. 328

This Court answered the immediate previous question in the negative because there is nothing shocking or of a persecuting nature in the state's demand that criminal trials be "free from the corrosion of substantial legal error."

Mr. Justice Frankfurter delineated this distinction in concurring in *Brock v. North Carolina,* 344 U.S. 424 (1953), when he said:

> " . . . A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time." 344 U.S. 429

Mr. Justice Frankfurter was obviously referring to a rule of fair play—due process means fair play. The double jeopardy provision of the Fifth Amendment encompasses substantially more than fair play as clearly evidenced by *Green v. United States,* 355 U.S. 184 (1957).

The complete retrial of an accused after he has purged the corrosive error of his trial by an appeal certainly does not infringe the fair play doctrine of the Due Process Clause. This Court, however, in *Green* said some complete retrials do infringe the double jeopardy provision of the Fifth Amendment. Therefore, to incorporate the double jeopardy provision of the Fifth into the Due Process Clause of the Fourteenth is to expand due process far beyond the mere fair trial and fair play concept, which would be unnecessary and unwarranted. The previously quoted rule enunciated by Mr. Justice Frankfurter which prevents calloused subjection to successive trials to thwart justice provides the individual with sufficient protection against the State. And, after all, what is the function of a constitution but to protect the individual from the oppressive and arbitrary action of the organized majority. The Bill of Rights and the Fourteenth Amendment were not adopted to merely afford a mere means of technical discharge. Their presence is to ensure justice—not undermine it.

As one writer has said:

> "Articulation of the policies to be served by the double jeopardy provision should not obscure the presence of an important countervailing consideration, the interest of society in preventing the guilty from going unpunished. While over emphasis of this factor may lead to abuse and a deprivation of the rights of the accused in circumstances where the risk of harassment is slight and that of improper

> acquittal is great the states interest in securing convictions should be given considerable weight." Note, 77 *Harv. L. Rev.*, 1272, 1274 (1964).

This has its most obvious manifestation in *Bartkus v. Illinois,* 359 U.S. 121 (1959) and *Abbate v. United States,* 359 U.S. 187 (1959) where this Court held that an acquittal in a state prosecution was no bar to prosecution for an identical offense in the federal system and vice versa. While the holdings in *Bartkus* and *Abbate* verge on the shocking, at first glance, they constitute recognition by this Court that iron-clad rules of double jeopardy might tend to undermine justice.

Justice means doing that which is right. But what is right defies stereotype and definition. It ultimately turns upon subjective analysis. Subjective analysis should generally be left to those courts applying their supervisory powers. The exception must lie where justice is denied in such a way as to be "so acute and shocking that our polity not endure it" and the super-ego of this Court must intervene.

This Court's reasoning, that double jeopardy application under modern procedure is a question of policy and not fundamental to ordered liberty, in *Palko v. Connecticut, supra,* is still valid, as it was in 1937 when propounded by Mr. Justice Cardozo. The holding in *Palko* should stand. The double jeopardy provision of the Fifth Amendment should not be made directly applicable to the States.

II.

ASSUMING ARGUENDO THE DIRECT APPLICABILITY OF THE DOUBLE JEOPARDY PROVISION OF THE FIFTH AMENDMENT TO THE STATES, PETITIONER WAS NOT PUT IN JEOPARDY TWICE.

Even assuming *arguendo* that the double jeopardy provision in the Fifth Amendment is incorporated in the Due Process Clause of the Fourteenth Amendment and directly applicable to the States, petitioner, in the case at bar was not "twice put in jeopardy." Petitioner's contention that his second trial violated the double jeopardy provision of the Fifth Amendment is preposterous in light of the facts, let alone under the applicable law.

Petitioner was charged by affidavit for causing the death of two people through the manner in which he drove an automobile. The affidavit contained two counts—one charging reckless homicide, Burns IND. STAT. ANN., § 47-2001, and the other involuntary manslaughter, Burns IND. STAT. ANN., § 10-3405. Both require the same proof, where a vehicle is involved. Only the punishment differs. *State v. Beckman,* 219 Ind. 176, 37 N.E.2d 531 (1941); *Rogers v. State,* 227 Ind. 709, 88 N.E.2d 755 (1949); *Ray v. State,* 233 Ind. 495, 120 N.E.2d 176, 121 N.E.2d 732 (1954). The jury found him guilty of reckless homicide. The jury's silence on the involuntary manslaughter count could hardly be deemed an acquittal when the two offenses are identical. It was nothing more than a manifestation of mercy. To call the jury's silence a finding of not guilty is wild speculation. To ask an appellate court to indulge in such speculation is to request judicial degradation.

Petitioner was put to trial the second time, after his successful appeal, on an affidavit charging the same offense

covered by two statutes. The jury again found him guilty of reckless homicide which prescribes the lesser penalty of the two. *Stroud v. United States,* 251 U.S. 15 (1919) is clearly controlling on such a fact pattern.

Stroud involved three successive trials for first degree murder. The first resulted in a death sentence. The second in life and the third for death. Under the federal statute the jury was permitted to fix the punishment. This Court in holding that the accused had not been put in jeopardy twice, said:

> "It is alleged that the last trial of the case had the effect to put the plaintiff in error twice in jeopardy for the same offense in violation of the Fifth Amendment to the Constitution of the United States. From what has already been said it is apparent that the indictment was for murder in the first degree; a single count thereof fully described that offense. Each conviction was for the offense charged. It is true that upon the second trial the jury added 'without capital punishment' to its verdict, and sentence of life imprisonment was imposed. . . . The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder." [cite omitted.] 251 U.S. 17-18

Likewise, in the case at bar, the jury was merely mitigating the penalty by their verdict of guilty on the reckless homicide charge.

The facts in *Green v. United States,* 355 U.S. 184 (1957) are clearly distinguishable from those in the case at bar. Green was initially prosecuted for arson and felony murder. The jury found him guilty of arson and second degree murder. At his second trial, after a successful appeal, he was found guilty of felony murder. This Court treated the

jury's silence on felony murder in the first trial as an acquittal on a failure of proof by the prosecution and therefore a bar to subsequent prosecution for felony murder. While it was pointed out that second degree murder was a lesser included offense of felony murder, the distinctions in proof required cannot be ignored. Felony murder requires proof of a killing committed in the perpetration of a felony. Second degree murder is the willful malicious killing without premeditation. While the distinctions in proof are subtle, they nonetheless do exist. Therefore, it is quite logical to say that conviction on the second and silence on the first is tantamount to acquittal by the jury on the first.

By contrast, in the case at bar, it can not be logically said that the jury's silence is tantamount to acquittal where the proof required for the two offenses is identical. The *Green* case therefore provides petitioner with little comfort. It is clearly distinguishable from the case at bar.

A.

Petitioner was not prejudiced by being tried a second time for involuntary manslaughter where the jury rendered an identical verdict of guilty of reckless homicide.

Constitutional rights do not exist in a vacuum. Nor do they exist for the sole purpose of affording a technical means of discharge. It is therefore necessary for one asserting the infringement of some constitutional right to make a showing of how such infringement prejudiced his right to a fair trial or the rendering of justice.

One asserting a denial of his right to a speedy trial must show prejudice. *Finton v. Lane,* 356 F.2d 850 (7th Cir.

1966), cert. den., — U.S. —, 86 S.Ct. 1593 (1966). This Court has, however, made a prejudice *per se* application to certain constitutional provisions. The application has been one of prejudice *per se* in the sense that the infringement is *per se* a denial of a fair trial thereby commanding a new trial free of taint. This is true in the areas of confessions, *Miranda v. Arizona,* — U.S. —, 86 S.Ct. 1602 (1966), search and seizure, *Mapp v. Ohio,* 367 U.S. 643 (1962), and right to counsel, *Gideon v. Wainwright,* 372 U.S. 335 (1963). This Court has, however, declined to hold the denial of those rights a bar to further prosecution. A similar approach has been taken by this Court in trial publicity cases, *Sheppard v. Maxwell,* 382 U.S. 916, 86 S.Ct. 1507 (1966), *Irvin v. Dowd,* 366 U.S. 717 (1961), and First Amendment cases. *Book "Fanny Hill" v. Atty. Gen. Mass.,* — U.S. —, 86 S.Ct. 975 (1966).

Since infringements of the double jeopardy provision constitute a bar to prosecution, common sense requires there be a showing of prejudice by the double jeopardy.

There is an obvious parallel between speedy trial and double jeopardy in the sense that denials of either result in bars to prosecution. Just as prejudice must be shown to have resulted from the denial of a speedy trial, *Finton v. Lane, supra,* it should likewise be a requirement of one asserting that he had twice been placed in jeopardy. Just as delay *per se* does not constitute grounds for discharge, double jeopardy *per se* should not be grounds for discharge. Otherwise the double jeopardy provision becomes a mere technical means of discharge.

The Speedy Trial Clause of the Sixth and the double jeopardy provision of the Fifth can not logically receive applications identical to the other rights specified in the Bill of Rights. They are procedural rather than evidentiary.

Their impact can have a greater significance in law enforcement and criminal jurisprudence than any of their fellow evidentiary rights. Their violation stands as an automatic bar to prosecution. This Court should, therefore, use greater caution and restraint to avoid weighting the scales of justice in favor of the criminally accused. A requirement of a showing of prejudice maintains this thin balance.

A requirement of showing prejudice permeates this Court's past decisions in the double joepardy area. *Ciucci v. Illinois,* 356 U.S. 571 (1958); *Hoag v. New Jersey,* 356 U.S. 464 (1958); *Brock v. North Carolina,* 344 U.S. 424 (1953); *Brantley v. Georgia,* 217 U.S. 284 (1910).

Petitioner in the case at bar can not even make a prima facie showing of prejudice. The facts speak loudly and clearly. He was in no way prejudiced by going to trial a second time for involuntary manslaughter. The jury's verdict was identical to that in the first trial.

Petitioner was never convicted of involuntary manslaughter, but twice convicted of reckless homicide. Any prejudice to petitioner would be speculative at best. The juries reacted as though he were never charged with involuntary manslaughter.

To discharge the petitioner in the absence of prejudice would be a flagrant disregard for justice where the juries twice ignored the involuntary manslaughter charge to find him guilty of reckless homicide.

B.

Petitioner waived his alleged double jeopardy when he sought a complete new trial which was granted by the state appellate court.

Petitioner in the case at bar filed a motion for new trial after his first trial which had resulted in his conviction for

reckless homicide. The trial court overruled that motion. He thereupon appealed that ruling to the Supreme Court of Indiana. His sole assignment of error was the trial court's overruling of his motion for new trial. The Supreme Court of Indiana granted him a new trial—a complete new trial.

At the second trial he was precluded under Indiana law from asserting a defense of double jeopardy to the charge of involuntary manslaughter.

In *Morris v. State,* 1 Blackf. 37 (1819), the Supreme Court of Indiana held that the accused had waived his defense of double jeopardy by seeking a new trial where he had been indicted for burglary and larceny and acquitted of burglary but convicted of larceny. He was tried for both at the second trial which resulted in an identical verdict. The court said:

> "It is now objected, that the second trial for the burglary was improper; and that although it was productive of no direct inconvenience to the plaintiff, it may have had an improper influence against him, on the charge of larceny. This objection is untenable. Independently of the general rule, that he who desires a new trial, must receive it as to the whole case, it cannot be supposed, that where there are two charges in an indictment, that an acquittal as to one can possibly vitiate the verdict of guilty as to the other."

The same court later in *Ex Parte Bradley,* 48 Ind. 548 (1874), held that if double jeopardy existed in the case after the new trial had been granted it was upon the accused's consent and concurrence. The court said:

> ". . . The legislature has interposed and said to all persons thus circumstanced, that if you believe you

> have been unjustly and wrongfully convicted, you may have another trial on the express condition that the State shall have the right to place you on trial again for the grade or grades of the offense of which you were found not guilty; and in our judgment, when a defendant asks and obtains a new trial, he thereby waives the constitutional protection, and must take it as the whole case." 48 Ind. 557-558.

The Indiana statute in question is Burns IND. STAT. ANN., § 9-1902. The provision in the Constitution of Indiana, Art. 1, § 14, on double jeopardy is almost identical to that in the Fifth Amendment. The Indiana court reaffirmed its position on waiver in *State ex rel. Lopez v. Killigrew,* 202 Ind. 397, 174 N.E. 808 (1931).

Obviously Indiana law on the waiver issue is inconsistent with this Court's views in *Green v. United States,* 355 U.S. 184 (1957). That, however, is not dispositive of the issue in the case at bar or in its application to the States.

Green involved a federal prosecution and it must be viewed in the context of this Court acting in its supervisory capacity, for the waiver question takes on new dimensions when viewed under the Fourteenth Amendment.

Mr. Justice Black, speaking for the court in *Griffin v. Illinois,* 351 U.S. 12, 18 (1956), pointed out that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review" and cited in support *McKane v. Durston,* 153 U.S. 684 (1894).

This Court in *McKane* said:

> ". . . A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the dis-

> cretion of the State to allow or not to allow such a review. . . .
>
> "It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper." 153 U.S. 687-688.

Indiana has made one of the terms under which one convicted of crime may appeal, that he receives a complete new trial and waives the question of double jeopardy. This is clearly Indiana's right under *Griffin* and *McKane.*

Griffin v. Illinois, supra, and *McKane v. Durston, supra,* prevent this Court from applying the *Green* waiver doctrine to the States unless they are to be specifically overruled.

Petitioner, therefore, must take his appeal under Indiana's terms. Under Indiana law he has waived his alleged double jeopardy by obtaining a complete new trial.

CONCLUSION

Petitioner has failed to show that the Fifth Amendment's double jeopardy provision should be applied directly to the States, but even if it were he has failed to make out a case of double jeopardy under any standard.

WHEREFORE, Respondent prays the Court affirm the decision of the Supreme Court of Indiana.

Respectfully submitted,
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